

proper feelings of dignity and pride have been injured aggravated damages may be awarded (*Rookes v. Barnard*⁽⁵⁾).

In our present case when counsel for the plaintiff suggested that damages should be assessed at \$5,000/- I think that he realised that the plaintiff, with respect, was not in the same class of writers as the Syed Alwi who had sued Dewan Bahasa & Pustaka. But as damages are at large and in the words of Horridge J. in *Fenning Film Service v. Wolverhampton Cinemas* "therefore I can give what amount I think right as if I was a jury ... to cover both the breach of contract and the tort". In all the circumstances of this case, I considered that I should be conservative and less liberal in my assessment of damages and therefore awarded the plaintiff damages in the sum of \$2,500/- only.

Order accordingly.

Solicitors: *Skrine & Co.; Syarikat Lek Yan.*

**WAZURAIYAH BTE. MOHAMED v. MEGAT
NAJMUDDIN & ORS.**

[O.C.J. (Abdul Malek J.) February 17, April 1 & 9, 1985]

[Kota Bharu — Originating Motion No. 16 of 1984]

Land Law — Private caveat — Application for removal — Joint venture agreement — Caveatable interest — Protection.

The applicant appealed against the dismissal of her application to remove a private caveat entered by the respondents over a piece of land in the Mukim of Tanjong Chat, State of Kelantan. One Tengku Zaid ("TZ"), the registered owner of the land agreed to sell it to Zaid Holdings on certain terms and conditions. There was a joint venture agreement between Gunong Petaling ("GP") and TZ with regard to the land, in respect of which TZ executed a transfer in Form 14A in favour of the applicant on May 7, 1983. TZ later died on May 11, 1983. The respondents entered the caveat on June 29, 1983. The applicant applied for the removal of the caveat.

Held, dismissing the application : (1) it is abundantly clear that the applicant's grounds must fail in view of the fact that the respondents had a caveatable interest in the land under the joint venture agreement;

(2) the rights of the respondents to the land ought to be protected by the caveat and accordingly the application to remove it should be dismissed with costs.

[*Editorial Note*: Notice of Appeal was filed on April 11, 1985.]

Cases referred to :

- (1) *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 M.L.J. 212.
- (2) *Registrar of Titles, Johore v. Temenggong Securities Ltd.* [1976] 2 M.L.J. 44.

[The following cases were also cited: *Foo Say Lee v. Ooi Heng Wai* [1969] 1 M.L.J. 47; *Hussanjan v. Haji Nik Yahya bin Nik Daud & Ors.* [1973] 1 M.L.J. 9; *Haji Hamid bin Ariffin & Ors. v. Ahmad bin Mahmud* [1976] 2 M.L.J. 79; *Teo Ai Choo v. Leong Sze Hian* [1982] 2 M.L.J. 12.]

ORIGINATING MOTION.

Manjit Singh for the applicant.

Wong Swee Min for the respondents.

Cur. Adv. Vult.

Abdul Malek J. : The applicant is appealing against the dismissal of her application to remove Private Caveat Presentation No. 206 of 1983 Jilid 1 Folio 36 (hereinafter "the caveat") which was registered on June 29, 1983 and entered by the respondents over the whole of the land held under Geran No. 10588 for lot No. 763 in the Mukim of Tanjong Chat in the State of Kelantan (hereinafter "the said land").

The basis of her application can be summarised in chronological order:

(a) on March 17, 1983 Zaid Holdings (hereinafter "ZH") passed a Directors' resolution approving the purchase of the said land for \$165,000/- and substituting itself for Tengku Zaid bin Tengku Ahmad (hereinafter "TZ") in the joint venture agreement between Gunong Petaling (hereinafter "GP") and TZ with regard to the said land (exhibit WM-1A);

(b) on March 18, 1983 the registered proprietor of the said land TZ agreed to sell the said land to ZH for \$165,000/- subject to terms and conditions mentioned in a letter of the same date (exhibit WM-1);

(c) on March 23, 1983 ZH resolved that TZ give a power of attorney to one Rosnani Abdul Hamid as regards all matters pertaining to the said land (exhibits WM-4 and WM-5B);

(d) on March 28, 1983 TZ issued the acknowledgment and receipt for the payment of \$165,000/-

as regards the said land (exhibits WM-2A and WM-2B);

(e) on March 29, 1983 ZH appointed the applicant as trustee in respect of the said land (exhibit WM-3);

(f) on May 7, 1983 TZ executed a transfer in Form 14A of the National Land Code in respect of the said land in the applicant's favour (exhibit WM-5A);

(g) on May 11, 1983 TZ passed away;

(h) on June 29, 1983 the caveat was entered by the respondents on the said land (see exhibit WM-6 as regards the application for entry of the caveat dated June 22, 1983); and

(i) on December 1, 1983, the applicant's solicitors wrote to the respondents requiring them to remove the caveat (exhibit WM-8).

The applicant's grounds are:

(a) that the respondents have no caveatable interest in the said land;

(b) that the respondents did not have any right to claim title to or any registrable interest in the said land or any right to such title or interest;

(c) that the said caveat was wrongly and improperly presented or lodged by the respondents.

By the third respondent's affidavits in reply, the respondents have raised the following points:

(a) differences in the spacing of the text and the signatures between exhibits WM-1A and MO-1b;

(b) the two letters written by TZ on April 20, 1983 to the respondents assigning two million ringgit of proceeds under the joint venture agreement between his and the respondents (exhibits MO-2a and MO-2b) to Kumpulan Holdings Sdn. Bhd. Because of these, the respondents are questioning the authenticity of the entire sale and purchase transaction between TZ and ZH on March 18, 1983;

(c) the authenticity of the acknowledgment and receipt (exhibits WM-2a and WM-2b) are being challenged by the estate of TZ;

(d) that the applicant has no *locus standi* to make

this application as TZ is a native of Kelantan, that the said land is Malay Reservation land (exhibit MO-3), that ZH is not a native Malay as defined by the Kelantan Malay Reservations Enactment 1930 and that the applicant has not established herself as a native Malay which even if she is, she is a mere trustee and the Enactment prohibited any dealings by native Malays in favour of a party that is not a native of Kelantan;

(e) that the said attorney Rosnani bt Abdul Hamid having executed the resolution dated March 17, 1983 which stipulated that ZH be substituted in place of TZ in respect of the joint venture agreement with GP could witness the assignment of TZ's interest to Kumpulan Holdings Sdn. Bhd. on April 20, 1983;

(f) that the said power of attorney on March 23, 1983 was improper and purportedly executed while TZ was in Singapore (exhibit MO-4);

(g) by the agreement dated January 5, 1982 between TZ and GP (exhibit WM-7), Clause IV(2) provided that the title to the said land be deposited with the developers' solicitors as stakeholders to enable them to deal with the said land;

(h) that by virtue of the agreement, GP had converted and subdivided the said land at a cost of \$101,472/-. and paid substantial legal, architectural and civil and structural engineering fees (exhibit MO-5) and is paying annual quit rent of \$12,400/-;

(i) by an agreement dated May 9, 1983, GP had assigned part of their rights, interest, benefits, liabilities and obligations under the joint venture agreement to the respondents (exhibit MO-6);

(j) that since TZ had deposited the title to the said land with the developers' solicitors, GP and the respondents have a lien over the said title;

(k) that the act of depositing the title with the GP's solicitors by TZ had impliedly fettered his rights to deal with the said land;

(l) the substantial performance by GP in relation to the agreement conferred an equitable interest on the respondents which the Court ought to protect;

(m) even if the sale and purchase agreement is held to be valid (which is denied) the respondents being first in time has priority over all other things being equal;

(n) by the resolution in exhibit WM-1A, ZH had recognised the joint venture agreement between GP and TZ; and

(o) since GP has filed proceedings for a declaration that GP is entitled to specific performance of the said land joint venture agreement whether by ZH or the personal representatives of TZ and that the personal representatives of TZ are proceeding to file papers to challenge the claim of ZH (exhibit MO-9), the interest of GP and the respondents should be protected.

Having given due consideration to the affidavits and arguments put forward by both counsel, I was of the view that the application to remove the caveat ought to be dismissed for the following reasons:

(a) as has been held in *Eng Mee Yong & Ors. v. V. Letchumanan*,⁽¹⁾ where the applicant under section 327 (of the National Land Code) is someone other than the caveatee (the registered proprietor), he has no registered title to rely upon as *prima facie* evidence of his interest in the land and it is for him to begin by satisfying the Court that there are sufficient grounds in fact and in law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat – for the reasons enumerated below, I found on the facts that the applicant had not raised sufficient grounds to satisfy the Court that she was aggrieved by the existence of the caveat;

(b) in the same case it has also been held that the caveator must first satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried and having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action by preventing the caveatee from disposing of his land to some third party – the Court was of the opinion that the respondents had in fact succeeded in proving this to the Court's satisfaction;

(c) the applicant in this case claims to be a trustee

for ZH but as can be seen from exhibit WM-3, it is a trust conditional upon the application for transfer from TZ to ZH not being accepted by the Kelantan Land Authorities. There is nothing in the affidavits to show that any application had in fact been made and the Court was of the view that in consequence no trust had in fact taken place between TZ and the applicant;

(d) the purported sale and purchase of the said land from TZ to ZH on March 18, 1983 is, apart from the ambiguous purchase price in view of the second condition that ZH is to settle all of TZ's outstanding personal loans with Kumpulan Kesuma Sdn. Bhd. and Kumpulan Travel Sdn. Bhd., beyond the scope of sections 7 and 12 of the Kelantan Malay Reservations Enactment 1930 and section 104 of the Kelantan Land Enactment 1938. The effect of the relevant provisions in these two Enactments amply show that only a person who is a Malay native of Kelantan can purchase the said land. There is nothing in the affidavit to show that the applicant falls within this category and, in any case, ZH clearly cannot fall within it as has been further stated in the 3rd paragraph of exhibit WM-1A. The only saving provision would be the approval of the Ruler in Council but then this would have to be specifically stated in the sale and purchase agreements;

(e) the Court held that since the purchase and sale agreement between TZ and ZH offended the relevant Enactments, it was on the face of it null and void and the consideration was irrecoverable and no action would lie for its breach;

(f) the Court was of the view that the sale and purchase from TZ to ZH cannot be said to be complete as apart from the purchase price of \$165,000/–, it was subject to the condition that ZH pay all outstanding loans of TZ to Kumpulan Kesuma Sdn. Bhd. and Kumpulan Travel Sdn. Bhd. There is no evidence to show what the amounts were and when or whether they were in fact paid;

(g) after the so-called sale and purchase transaction on March 18, 1983, TZ sent letters to GP on April 20, 1983, witnessed by his attorney, assigning two million ringgit of his interest to Kumpulan Holdings Sdn. Bhd. If there had in fact been a sale and purchase, why did TZ

further assign his interest under the joint venture agreement with GP a month later?

- (h) by virtue of the joint venture agreement with GP, TZ had in fact deposited the title with GP's solicitors and had agreed not to deal with the said land. The sale and purchase agreement on March 18, 1983 and the assignment of his interest on April 20, 1983 and now held null and void circumstances surrounding the sale and purchase illustrate the fraudulent interest of TZ not to honour his part of the bargain in the joint venture agreement with GP.

It is pertinent to note here that I felt that two of the matters raised by the respondents ought not to be given consideration. One was the issue of the different spacing and signatures and since the third respondent himself could not verify the authenticity of the originals, I held that this allegation should be disregarded. The other was the fact that TZ was in Singapore on the day the power of attorney was executed. I felt that exhibit WM-4 did not really establish this point.

It has been held in *Registrar of Titles, Johore v. Temenggong Securities Ltd.*⁽²⁾ that the purpose of a private caveat is to preserve the *status quo* pending the taking of timeous steps by the applicant (caveator in this case) to enforce his claim to an interest in the land by proceedings in the Courts. The respondents had in fact filed an action for specific performance vide Kota Bharu Originating Summons No. 278/84 by either ZH or the administrators of TZ's estate on the joint venture agreement.

For the reasons given, it is abundantly clear that the applicant's grounds must fail in view of the fact that the respondents had a caveatable interest in the said land under the joint venture agreement and I held that the rights of the respondents to the said land ought to be protected by the caveat and accordingly dismissed the application to remove it with costs.

Application dismissed.

Solicitors: Sri Ram Zulkifly & Kumar; Megat Najmuddin, Leong & Co.

MALAYSIA OVERSEAS INVESTMENT CORPORATION SDN. BHD. v. SRI SEGAMPUT SUPERMARKET SDN. BHD.

[O.C.J. (Siti Norma Yaakob J.) October 14, 1985]

[Kuala Lumpur — Civil Suit No. F.276 of 1985]

Contract — Performance guarantee — Injunction by plaintiffs restraining bank from payment — Application to dissolve injunction by defendants — No allegation of fraud — No serious issues — Balance of convenience — Dissolution of injunction.

- C The plaintiffs obtained an *ex parte* interim injunction restraining Malayan Banking Bhd. (not a party to this action) from paying out a certain sum of money to the defendants in respect of a performance bond executed by the bank in favour of the defendants until the trial of this action. The plaintiffs had earlier entered into an agreement with the defendants to develop certain lands. Work on the project never got beyond the initial stages when the plaintiffs ran into financial difficulties in meeting their obligations under the agreement. As a result the defendants demanded payment of the sum of \$1.5 million under the performance bond by a certain date. Upon the defendant's application to dissolve the injunction:

- E Held: (1) on the facts, the performance bond dated August 10, 1984, was payable upon demand by the defendants and as there was no allegation of any fraud, the plaintiff could not stand in the way of the defendants realizing the sum due under the performance bond. The dispute between the plaintiffs and the defendants on the main contract did not affect the right of the bank to make payment upon demand by the defendants;

- F (2) following *American Cyanamid v. Ethicon Ltd.*,⁽¹⁰⁾ as there were no issues to be tried on the performance bond, the interim injunction should be dissolved, with costs to the defendants.

[Editorial Note: This decision is on appeal vide Rayuan Civil No. 285/85 dated September 19, 1985.]

- G Cases referred to:

- (1) *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. & Anor.* [1978] 1 Q.B. 159.
- (2) *Howe Richardson Scale Co. Ltd. v. Polimex-Cekop and National Westminster Bank Ltd.* [1978] 1 Lloyd's Rep. 161.
- (3) *Intraco Ltd. v. Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256; [1981] Com. L.R. 184.
- (4) *Hong Kong Vegetable Oil Co. Ltd. v. Malin Sirinaga Wicker & Ors.* [1978] 2 M.L.J. 13.
- (5) *Government of Pakistan v. Seng Peng Sawmills Sdn. Bhd. & Ors.* [1979] 1 M.L.J. 219.
- (6) *Edison & Swan United Electric Light Co. v. Holland* (1889) 41 Ch. 28.
- (7) *R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd. & Ors.* [1978] 1 Q.B. 146.
- (8) *Ho Kok Cheong Sdn. Bhd. v. Lim Kay Tiong & Ors.* [1979] 2 M.L.J. 224.